IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P.C. PFEIFFER COMPANY, INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents,

and

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND THE AMERICAN INSURANCE ASSOCIATION, AS AMICI CURIAE

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The Alliance of American Insurers, the National Association of Independent Insurers, and the American Insurance Association (hereinafter collectively referred to as "Amici") move pursuant to Rule 42(3) of the Supreme Court Rules for leave to file the attached Brief as *amici curiae* in support of the Petitioners. Counsel for the Petitioners and Counsel for the Federal Respondent have consented to the filing of this Brief. Counsel for Respondents have not consented.

The Alliance of American Insurers is an organization of 119 property-casualty insurance carriers. Its members write approximately 25% of the workers' compensation insurance premiums in the United States, and in 1975 its members wrote approximately 1.5 billion dollars in workers' compensation premiums. With respect to Longshoremen's Act premiums, its members wrote approximately 30 million dollars out of a total for 1976 of nearly 75 million dollars.[1] The National Association of Independent Insurers is a voluntary trade association of over 400 insurance companies. Its members write approximately 10% of the workers' compensation premiums in the United States. The American Insurance Association is an association of 145 property-casualty insurance carriers. Its members write approximately 45% of the workers' compensation insurance in the United States.

Section 32 of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "Longshoremen's Act"), 33 U.S.C. §932, requires each covered employer to secure the payment of compensation by either (1) obtaining compensation insurance from an authorized carrier, or (2) furnishing satisfactory proof of its financial ability to pay such compensation as a self-insurer. To satisfy their obligations under the Longshoremen's Act, and the several statutes in which it has been incorporated, many employers have obtained

[1] These 1975 and 1976 statistics are the latest available, and Amici believe them to be representative of the situation as it exists now.

workers' compensation policies from members of Amici. For these reasons, Amici have been vitally concerned with the operation of the Longshoremen's Act generally and have a great interest in the issues before the Court in this particular case.

The question before the Court is whether the 1972 Amendments extended the jurisdiction of the Longshoremen's Act inland to categories of non-amphibious, warehouse or terminal workers who satisfy none of the post-amendment criteria for such jurisdiction discussed in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977). The Federal Respondent has taken the position that maritime employment includes all physical cargo handling in the waterfront area and all tasks necessary to transfer cargo between land and water transportation. Federal Respondent's Memorandum On The Petition For A Writ Of Certiorari at 3-4. The Benefits Review Board of the Department of Labor has advanced the same position in its decisions on coverage questions. Moreover, the Federal Respondent and the Benefits Review Board have sought to expand the coverage of the Longshoremen's Act to employers not engaged in traditional maritime activity and to activities having no direct relation to a vessel's navigation and commerce.

The expansive position of the Federal Respondent, in this case and in general, with respect to the jurisdiction of the Longshoremen's Act has had and is continuing to have a significant and detrimental impact on members of Amici. The availability and cost of insurance for Longshoremen's Act compensation have been gravely affected by the expansive approach taken to Longshoremen's Act jurisdiction by the Federal Respondent and the Benefits Review Board. The continued unrestricted expansion of the coverage provisions of the 1972 Amendments would have a significant impact upon the members of Amici and their existing and future workers' compensation contracts.

Amici do not believe that the parties have considered the issue before this Court, and its potential ramifications, in the same manner as treated by Amici in their Brief. Amici therefore request that this Court grant leave to file the attached Brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE

The interests of Amici are set forth in the Motion which precedes this Brief.

QUESTION PRESENTED

Did the 1972 Amendments expand the jurisdiction and coverage of the Longshoremen's Act to those not engaged in traditional maritime activity and to activities having no direct relation to a vessel's navigation and commerce?

SUMMARY OF ARGUMENT

The decision below should be reversed because it expands coverage under the Longshoremen's Act beyond the Congressional intent in enacting the 1972 Amendments. Ford and Bryant are not covered under either of the lines of analysis used by this Court in the *Caputo* decision. The Federal Respondent and the Benefits Review Board have in effect attempted to eliminate the maritime employment status requirement for coverage by advocating the expansion of coverage to any employee who happens to work on or near the waterfront. It is vitally important that this Court signal a halt to the unrestricted expansion of coverage under the 1972 Amendments to the Longshoremen's Act.

The unpredictability and uncertainty caused by the unrestricted expansion of coverage is compounded by uncapped benefit escalation and other open-ended benefit features of the 1972 Amendments. Many employers and industries are finding that their exposure under the Longshoremen's Act is uninsurable because primary and excess insurers are reluctant to underwrite a risk which appears so indefinite in both the scope of coverage and the level of benefit payments.

In the decision of the instant cases, this Court should articulate a clear and definitive test for maritime employment which requires that the work have a direct relation to a vessel's navigation and commerce or have a realistically significant relationship to traditional maritime activity. Amici also urge this Court to adopt the day of the injury as the time frame of the employment activity which is examined for purposes of determining coverage.

ARGUMENT

I.

THE UNRESTRICTED EXPANSION OF THE COVERAGE PROVISIONS OF THE 1972 AMENDMENTS HAS CREATED SUCH UNPREDICTABILITY THAT THE MARKET FOR LONGSHOREMEN'S ACT INSURANCE IS DRYING UP AND BECOMING PROHIBITIVELY EXPENSIVE.

On remand the Fifth Circuit stated that its prior holding that Ford and Bryant were covered under the 1972 Amendments was consistent with the rationale expressed by this Court in *Caputo. Jacksonville Shipyards, Inc. v. Perdue,* 575 F.2d 79, 80 (5th Cir. 1978). The rationale of this Court's decision in *Caputo* consisted of two lines of analysis of the coverage issues: (1) Blundo's work was performed on shore, rather than on land, only because of modern cargo-handling techniques, and (2) Caputo was an amphibious worker who, without Longshoremen's Act coverage for on shore activities, would walk in and out of coverage. 432 U.S. at 270-72. Nevertheless, the Fifth Circuit found coverage even though Ford and Bryant (1) were not amphibious workers and (2) were not performing on shore activities because of modern cargo-handling techniques.

The Fifth Circuit's decision was rendered on the urgings of the Federal Respondent who argued that the *Caputo* decision

dictates the conclusion that the term longshoring operations in Section 2(3) "includes, in effect, all terminal functions performed by a waterfront cargo-handling employer." Federal Respondent's Brief on Remand to the Fifth Circuit at 16-17. Amici disagree with the position of the Federal Respondent and the holding of the Fifth Circuit because they ignore the most functional part of coverage analysis enunciated in *Caputo,* i.e., that the text and legislative history of the 1972 Amendments demonstrated a desire to extend coverage to amphibious workers who spend at least some of their time in indisputably longshoring operations. 432 U.S. at 273.

Ford and Bryant were not longshoremen and they were not amphibious workers. They did not and could not go aboard a vessel during the course of their employment. Their work had no direct relationship to any particular vessel. Their activities — railroad loading and pier warehousing — are not traditional maritime activities. The Federal Respondent, however, continues to campaign for the widest possible expansion of coverage under the Longshoremen's Act by contending that Ford and Bryant were engaged in longshoring operations.

The activities of Ford and Bryant do not meet the definition of "longshoring operations" promulgated by the Federal Respondent prior to the enactment of the 1972 Amendments. Two definitions of "longshoring operations" adopted by the Department of Labor, in effect in 1972 and still in effect today, show that longshoring operations must have a *direct* relationship to a vessel on navigable waters:

> "'Longshoring operation' means the loading, unloading, moving, or handling of, cargo, ship's stores, gear, etc., *into, in, on, or out of any vessel."* 29 C.F.R. §1504.3(i), *presently* §1910.16(b)(1). (emphasis added).

> "The term 'longshoring operations' means the loading, unloading, moving, or handling of cargo, ship's stores, gear, etc., *into, in, on, or out of any vessel on the navigable waters* of the United States." 29 C.F.R. §1918.3(i). (emphasis added).

Neither Ford nor Bryant was handling cargo into, in, on, or out of any vessel.

Amici are gravely concerned by the continued refusal of the Federal Respondent to recognize that there are limitations on coverage. The text of the 1972 Amendments and their legislative history demonstrate that not every worker on the waterfront is covered. The position of the Federal Respondent has been repeatedly proclaimed in the decisions of the Benefits Review Board and in administrative guidelines and memoranda issued by the Department of Labor. This has caused widespread underwriting unpredictability and uncertainty among the members of Amici and in the insurance industry generally.

Prior to the 1972 Amendments, there was a relative degree of certainty and predictability as to what was covered and what was not covered by the Longshoremen's Act. The expansion of the Longshoremen's Act advanced by the Federal Respondent and the Benefits Review Board has destroyed that certainty and created substantial confusion.

The Courts of Appeals have recognized the two lines of analysis used by this Court to find coverage for claimants Blundo and Caputo. By and large, they have attempted to apply one or both of them. For example, in *Handcor, Inc. v. Director,* 568 F.2d 143 (9th Cir. 1978), a member of a container stuffing gang was held to be covered, the stuffing activity onshore having resulted from the advent of containerized operations. In *Dravo Corp. v. Banks,* 567 F.2d 593 (3d Cir. 1977), a boatyard maintenance employee injured while spreading salt on the walkways was held not to be covered; he was not an amphibious worker and his onshore activities were not the result of modern cargo-handling techniques. In *Cargill,*

Inc. v. Powell, 573 F.2d 561 (9th Cir. 1977), a tipper switchman at a grain handling facility was held not covered under the Longshoremen's Act. The switchman was not an amphibious worker and he did not go on board vessels. In *Conti v. Norfolk & Western Railway,* 566 F.2d 890 (4th Cir. 1977), a brakeman at a railroad coal handling terminal was also held not covered. The brakeman was not an amphibious worker and he did not go on board vessels.

On the other hand, in two cases gearmen and mechanics who repair cargo-handling equipment were held to be covered because they were amphibious workers who do their jobs both on and off vessels: *Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137 (9th Cir. 1978); *Texports Stevedoring Co. v. Winchester,* 554 F.2d 245 (5th Cir. 1977), *rehearing granted,* 569 F.2d 428 (1978).

While Amici believe that the two lines of analysis enunciated in *Caputo* are not sufficiently specific to provide the insurance industry with the underwriting predictability that is required,[1] the position of the Federal Respondent ignores the limitations contained in the *Caputo* analyses, thereby promoting further confusion as to the scope of the coverage under the 1972 Amendments. Nowhere is this confusion better reflected than in the decisions of the Benefits Review Board, which has been singularly unhelpful in articulating any consistent rationale for deciding coverage cases under the 1972 Amendments. To our knowledge, the Board has not yet responded to this Court's request that the Board provide a study of the structure of work on the various piers of the country. *Caputo,* 432 U.S. at 272-73 n.34. The Board has continually disregarded the Senate and House Committees' statement that the 1972 Amendments were intended "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part

[1] *See Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test Of Status After Northeast Marine Terminal Co. v. Caputo,* 64 Va. L. Rev. 99, 100, 113 (1978).

of their activity."[2] This is the excerpt from the legislative history that underpins the amphibious worker analysis enunciated in *Caputo.* 432 U.S. at 272 n. 34.

The Board has not applied the amphibious worker analysis in its post-*Caputo* decisions. Mechanics who repair cargo handling equipment have been held covered but without any mention as to whether they are amphibious workers. *See, e.g., Lewis v. Pittston Stevedoring Co.,* 7 BRBS 691 (1978); *Jameson v. Marine Terminal Corp.,* 6 BRBS 424 (1977); *Stecz v. Sealand Service, Inc.,* 6 BRBS 291 (1977). Board decisions have fostered confusion and uncertainty in the minds of hundreds of employers and their insurers who might have some connection with cargo shipments or some proximity to navigable waters.

There follow some examples of how the Board has expanded coverage since *Caputo* into industries and activities which have no direct relation to a vessel's navigation and commerce and are not traditional maritime activity: *Frisco v. Perini Corp.,* 8 BRBS 694 (1978) (piledriver employed by construction company on drydock enlargement project held covered); *Reese v. Weyerhaeuser Co.,* 8 BRBS 379 (1978) (employee of lumber company cleaning wood chips off a blowpipe from sawmill to wood chip pile held covered); *Bosarge v. Mississippi Coast Marine, Inc.,* 8 BRBS 224 (1978) (carpenter employed by small boatyard held covered); *Bakke v. Duncanson-Harrelson Co.,* 8 BRBS 36 (1978) (piledriver of construction company repairing Coast Guard dock held covered); *McNeil v. Prolerized New England Co.,* 8 BRBS 1 (1978) (employee of scrap metal processor repairing conveyor belt held covered); *Fuduli v. Maresca Boat Yard, Inc.,* 7 BRBS 982 (1978) (painter employed by small boatyard to paint pleasure craft held covered); *Carroll v. Hullinghorst Industries,* 7 BRBS 538 (1978) (carpenter building scaffolding to be used during

[2] S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H. R. Rep. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4708.

the repair of cargo handling equipment held covered); and *Cross v. Lavino Shipping Co.*, 6 BRBS 579 (1977) (cooper who repaired boxes and barrels and who rarely went aboard vessels held covered while enlarging the receiving window in the office).

Finally, the Board has steadfastly announced that it will ignore the maritime employment status test if it would defeat coverage for an injury occurring on navigable waters.[3] Thus the Board refuses to treat maritime employment status as a test for *and limitation on* coverage even though Congress specifically added the "maritime employment" requirement to §2(3) of the Longshoremen's Act when it enacted the 1972 Amendments.

This Court appreciates that while coverage has been expanded under the situs test, it has been contracted by the addition of the status test, as is shown by the discussion in *Caputo* of the new maritime employment requirement for coverage. 432 U.S. at 264. The Fifth Circuit as well has held that an employee injured over navigable waters is nevertheless not covered if he cannot meet the status test enunciated in *Caputo*. *Thibodaux v. Atlantic Richfield Company*, 580 F.2d 841 (5th Cir. 1978). The Board, however, has chosen to ignore the status test requirement when it would interfere with its design to expand jurisdiction under the Longshoremen's Act as far as possible.

The unpredictability of coverage under the Longshoremen's Act is aggravated by the concept of concurrent jurisdiction. Under this approach, an employee can file compensation claims under both the Longshoremen's Act and a state act, and the employer/insurer must process and defend two claims on the same injury. The employee is not required to elect his compensation remedy. After the employee and his attorney have seen which compensation system proves to be the most

[3] *See Stewart v. Brown & Root, Inc.*, 7 BRBS 356 (1978), in which the Board reiterated its position that the 1972 Amendments do not exclude anyone who would have been covered prior to 1972.

advantageous, the employee is required to credit the employer/insurer with the benefits paid under the other system.

The Federal Respondent has fostered this additional source of coverage unpredicatability by taking the position that state workmen's compensation laws and the Longshoremen's Act apply concurrently to injuries on land. *See* Memorandum for the United States as Amicus Curiae, *Territo v. Poche*, 339 So.2d 1212 (La. 1976), *appeal dismissed*, 98 S.Ct. 31 (1977) (No. 76-1258).[4] In other words, the Federal Respondent would maintain that Caputo, Blundo, Ford, and Bryant were covered not only under the Longshoremen's Act, but under the state statute as well.

A final example of the uncertainty caused in the insurance industry by the unrestricted expansion of jurisdiction under the Longshoremen's Act is LHWCA Program Memorandum No. 58, published on August 10, 1977, by the Office of Workers' Compensation Programs of the Department of Labor two months after this Court's decision in *Caputo*. In stating its test for maritime employment, the Office of Workers' Compensation Programs stated:

> "The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry, in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had 'employee' status under Section 2(3)."

This is no test at all; it is a distortion of the statutory language, Congressional intent, and the analyses set forth in *Caputo*. It causes confusion because it is unrealistic. It refers to "waterfront cargo-handling industry," which is not an identifiable industry and does not in fact exist as an industry. The employers who come to the members of Amici for coverage are

[4] Before the appeal was dismissed, the Solicitor General was invited by this Court to file briefs expressing the views of the United States on the appeal. 97 S.Ct. 1693 (1977).

stevedores, construction companies, scrap metal processors, terminal operators, shipyards, marinas, lumber companies, coal exporters, warehousemen, etc. The term "waterfront cargo-handling industry" is so broad and so unrealistic that it has generated substantial confusion among employers and insurance carriers as to what kinds of coverages are needed by employers. In addition, the "essentially quite simple" test proposed by the Office of Workers' Compensation Programs eliminates any relationship between the employment and a vessel's navigation and commerce. It eliminates any direct involvement with the loading and unloading of vessels. Instead of loading and unloading vessels or amphibious occupations, the Office of Workers' Compensation Programs states that the work of the employee need be related "only to the cargo or to the equipment or premises used to handle it."

Memorandum No. 58 contained other broad and expansive proclamations as to coverage. For example, the term harbor-worker was defined as including employees "whose employment is clearly identified with the water or the waterfront." Employees at marinas and recreational boat builders located near the water are also proclaimed to be covered, an action which sent shock waves through the small boating and marina industries.

II.

THE ESCALATING AND UNCAPPED BENEFITS PAYABLE UNDER THE 1972 AMENDMENTS HAVE CAUSED THE COMPENSATION EXPOSURE OF MANY EMPLOYERS AND INDUSTRIES TO BE UNINSURABLE.

The unrestricted expansion of jurisdiction is not, unfortunately, the only problem causing underwriting unpredictability. Uncertainties with regard to coverage are compounded by uncapped benefit escalation and other open-ended features of the 1972 Amendments. The effect has been to create severe difficulties in the insurance market in providing

compensation insurance for the Longshoremen's Act. Many, many insurance companies have withdrawn from the market for Longshoremen's Act insurance and those who remain are forced to charge very high premiums. It is not an exaggeration to say that for many employers the risk is uninsurable.

The major factors which, in addition to unrestricted coverage, have caused unpredictability and uninsurable risks are the combination of the removal of ceilings on the benefits payable with the annual escalation in the rate of benefits payable and the payment of benefits for deaths unrelated to employment. These features make the Longshoremen's Act more like a veritable retirement annuity or social security than a wage replacement program. Printed in the Appendix to this Brief is a listing and summary of the provisions added to the Longshoremen's Act by the 1972 Amendments which increased the exposure of employers and insurance carriers.

Although the members of Amici have lived with unlimited benefits under many state compensation statutes for many years, the combination of the factors mentioned above has resulted in entirely new benefit utilization patterns. Amici believe that more people are claiming work related injuries and that injured persons now remain out of work for considerably longer periods of time. The annual escalation of benefits without a cap or limitation on the percent of annual escalation has made it increasingly difficult to reserve Longshoremen's Act cases with any degree of accuracy. It is essential, of course, that rate levels must be high enough to cover all future losses from accidents arising in the course of a specific policy year. The insurance industry must persuade both policy holders and state regulators what future losses are expected to be generated with some degree of accuracy. The greater the uncertainty, or potential margin of error, in the industry's measurement of current and future losses, the more difficult the persuasion job is.

Finally, the members of Amici are experiencing problems generated from the potential benefits to be paid for deaths unrelated to covered employment. Sections 8(d) and 9. It is difficult, if not impossible, to establish reserve amounts where the claimant may die from a cause unrelated to his employment.

The real-world effects of this unpredictability, uncapped and escalated compensation benefits, the drying up of the insurance market, and uninsurable risks on employers and the insurance industry were brought out in the Oversight Hearings before the House Subcommittee on Compensation, Health and Safety in 1977.[5] Excerpts from the testimony and statements received by the Subcommittee are printed in the Appendix to this Brief for this Court to read. A summary of the key points made by some of the witnesses is, however, appropriate at this point. A witness from the State Compensation Insurance Fund of California testified that the market for Longshoremen's Act insurance had deteriorated as a result of the 1972 Amendments, subsequent decisions by the Benefits Review Board, and administrative memoranda issued by the Department of Labor. As a result, the California legislature enacted emergency legislation in 1976 to deal with the lack of available Longshoremen's Act insurance. (App. 1a-2a). A Vice-President of Fireman's Fund Insurance Company testified that the market was "tight" and that his company did not want to go out and write Longshoremen's Act insurance. (App. 3a). The Western Fish Boat Owners Association presented testimony that if the small boatyards and shoreside fish processing facilities supporting the U.S. fishing industry are subjected to the Longshoremen's Act, it would result in increased advantages to foreign fishing fleets and fish processing ships which operate off our coasts. (App. 4a). Several self-insured stevedore employers testified that

[5] Oversight Hearings of Subcommittee on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter referred to as "Oversight Hearings"). Part I of the testimony and statements has been printed and is available; Part II is expected shortly.

their self-insured retention[6] rose from $50,000 in 1974 to $150,000 in 1977. These self-insured employers are also paying sharply increased premiums for the excess insurance despite the higher retention levels. (App. 4a-8a). A representative of the Shipbuilders Council of America testified that the market for Longshoremen's Act insurance is virtually non-existent and that as a result the shipbuilding industry faces an insurance crisis. (App. 8a-9a). A representative of a trade association of the recreational boating industry testified on the effect of the Department of Labor's Notice No. 21 that employees of boating facilities were covered under the Longshoremen's Act. Members of the association have been told by their insurers that they will either not write the insurance or will do so only at premiums which drive small companies out of business. (App. 1a). The problem has been recognized by an Assistant Secretary of the Department of Labor (App. 8a), but Amici have detected no change in the positions of the Federal Respondent which are causing the skyrocketing costs and the deleterious effects on the market for Longshoremen's Act insurance.

These concerns must be taken seriously by this Court. A further expansion of jurisdiction and continued uncertainty as to jurisdiction will expand and multiply the unpredictability and uninsurable risks which already exist. The tightening up of the market for Longshoremen's Act insurance is a direct product of these uncertainties. The Longshoremen's Act has become an extremely rich program. For example, assume that a longshoreman who has reached his work life expectancy of 65 receives a rating of permanent total disability and assume that he has a wife 63-years old. If he is eligible for an average compensation rate of $200 per week, total payout over the joint life expectancy of the longshoreman and his wife will be $286,640. It is obvious that this level of benefits for a

[6] The primary risk which the self-insured employer must pay before excess coverage comes into play. It is akin to a large deductible.

longshoreman approaching retirement, which would be in addition to the benefits he and his wife would receive under Social Security and his normal union retirement fund, far exceed what is necessary for wage replacement.

All of these factors have affected the availability of Longshoremen's Act insurance since the passage of the 1972 Amendments. The effects on the members of Amici are restrictions on their capacity to write Longshoremen's Act insurance and difficulties in securing adequate reinsurance of what they do write. Self-insured employers have similar problems, perhaps even more severe because without Longshoremen's Act coverage they cannot stay in business.

Predictability has been affected two ways. In the first place, it is impossible to predict with any degree of certainty the effect which escalation of benefits through indexing[7] is going to have on the total cost of a claim. Workers' compensation benefits are prefunded, and a miscalculation as to future rate of inflation may have drastic effects on the financial stability of those companies providing Longshoremen's Act insurance. The high benefit level has created such a small differential, if any, between take-home pay and compensation benefits that the incentive to return to work has been reduced, and disabilities are prolonged. Because the exposure and risk of Longshoremen's Act insurance is so unpredictable, insurance companies have shied away from it.

Insurance companies are also finding it more and more difficult to secure adequate reinsurance on their Longshoremen's Act exposure. Insurance companies find it necessary to buy insurance protection just as would any other company.

[7] Section 6(b)(3) was added to the Longshoremen's Act by the 1972 Amendments. Pursuant to that subsection, the Secretary of Labor makes an annual determination of the national average weekly wage. As that figure increases each year due to inflation, the compensation benefits which are indexed to the national average weekly wage also increase.

Few, if any, insurance companies ever reach the point where they do not need reinsurance. Reinsurance companies are becoming increasingly cautious about accepting risks with the Longshoremen's Act exposure. They are reducing the limits they are willing to write, and they are requiring higher retention limits forcing primary insurers out of the market. Amici understand that a number of reinsurance carriers are, today, attempting to negotiate the exclusion of the escalation feature from the reinsurance provided to the primary insurers. Such limited reinsurance would be totally inadequate for primary insurers.

The unrestricted expansion of coverage has also had a detrimental effect on the administration of the Longshoremen's Act. The 1972 Amendments thrust upon the Department of Labor entirely new administrative responsibilities for which the Department was ill-prepared. An important reason explaining the long delays which have developed in the administration of the Longshoremen's Act is that a substantial number of new employers became subject to the Longshoremen's Act as a result of Benefits Review Board decisions and Department of Labor administrative memoranda. Of course, some increase was to be expected from the extension of coverage to amphibious workers injured on land, but the increase has far exceeded what was expected. In fiscal year 1976, 57 percent of all claims filed were based on claims of expanded coverage. Amici believe that most of the current administrative failures can be traced directly to the 1972 Amendments and the positions of the Federal Respondent and the Benefits Review Board in interpreting and administering the Longshoremen's Act.

III.

THIS COURT SHOULD ADOPT A CLEAR DEFINITION OF MARITIME EMPLOYMENT AND TESTS FOR COVERAGE UNDER THE LONGSHOREMEN'S ACT WHICH REQUIRE THAT THE WORK HAVE A DIRECT RELATION TO A VESSEL'S NAVIGATION AND COMMERCE OR HAVE A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY.

Amici urge this Court to adopt a clear test of maritime employment which requires that the work have a direct relation to a vessel's navigation and commerce or have a realistically significant relationship to traditional maritime activity. Several Courts of Appeals have adopted this approach. *See Conti v. Norfolk & Western Railway,* 566 F.2d 890, 895 (4th Cir. 1977); *Weyerhaeuser Co. v. Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976). The uncertainty as to Longshoremen's Act coverage and the attendant unpredictability in the insurance industry can be remedied if this Court enunciates a clear definition of these terms.

Relying on this Court's decision and analysis in *Executive Jet Aviation, Inc. v. City of Cleveland,* the Ninth Circuit used traditional maritime activity as a test for maritime employment:

> "We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in §903. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972)." *Weyerhaeuser Co. v. Gilmore, supra,* at 961.

While Amici do not question the *Caputo* decision on its facts, it did not articulate definitive coverage tests which would guide the lower courts and halt the unrestricted expansion of coverage proposed by the Federal Respondent here and implemented by the Benefits Review Board in its decisions. The two analyses used by the Court in *Caputo* — (1) coverage for onshore activities resulting from modern cargo-handling techniques, and (2) coverage for workers in amphibious occupations in order to secure a uniform compensation system for those workers — are helpful guides, but they are not sufficient to resolve the coverage questions which arise in a variety of situations.

One commentator, writing after *Caputo,* has recognized the need for more predictable tests consistent with the *Caputo* analysis and the Congressional intent:

> "Courts, commentators, and maritime employers all have recognized the importance of the problem of defining status for purposes of the LHWCA. Although the complex structure and customs of the maritime industry cloud the issues, any proposed test of status should meet at least three criteria. First, it should be consistent with the Supreme Court's opinion in *Northeast Marine Terminal.* Second, it should ratify Congress's intent in providing a federal system of compensation and in amending that system in 1972. Finally, it should allow workers, employers, and adjudicative bodies to determine simply and with certainty the status of any employee at any time." *Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test Of Status After Northeast Marine Terminal Co. v. Caputo,* 64 Va. L. Rev. 99, 100 (1978).[8]

[8] The commentator recommended an "expanded point of rest" test. 64 Va. L. Rev. at 113-16.

The Longshoremen's Act is national in scope, and for that reason a reasonable certainty as to coverage can be established only by this Court or Congress. The Courts of Appeals have come up with several different approaches, tests, and rationales for coverage resulting in an unsatisfactory disparity in the treatment of coverage questions under the Longshoremen's Act. *See Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test Of Status After Northeast Marine Terminal Co. v. Caputo,* 64 Va. L. Rev. 99 (1978). The Benefits Review Board, quite frankly, abandoned any opportunity it might have had to establish on a national basis reasonable certainty as to coverage when it assumed through its decisions an advocate's posture for unrestricted expansion.[9]

This Court is uniquely situated to enunciate the clear and workable tests and definitions that are needed to resolve the coverage uncertainties plaguing employers and the insurance industry. In fashioning these tests and definitions, Amici urge upon the Court the following considerations:

Workers in Amphibious Occupations. This line of analysis from *Caputo* can be crystallized into a test for coverage. Amphibious workers whose assignments can take them back and forth across the water's edge during the course of a day's work are covered under the Longshoremen's Act. Non-

[9] The confidence of employers and insurance carriers in the Benefits Review Board has not been enhanced over the years by the 424 decisions handed down prior to August 4, 1977. See Oversight Hearings at 523. An analysis of those decisions reveals that the employers/insurance carriers have not prevailed in 86% of their appeals to the Benefits Review Board:

Out of 259 Employer Appeals
Employer Prevailed in 37 decisions (14%)
Employer Lost in 222 decisions (86%)

Out of 424 total Appeals

Claimant appealed and prevailed in.....87 Board decisions (20.5%)
Claimant appealed and lost in .....73 Board decisions (17.2%)
Employer appealed and prevailed in.....37 Board decisions (8.2%)
Employer appealed and lost in .....222 Board decisions (52.4%)

amphibious workers, such as Ford and Bryant, whose assignments cannot take them across the water's edge remain covered by the applicable state workmen's compensation statute. The results of this test would be consistent with the express intent of Congress as stated in the Committee Reports "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity."[10]

Maritime Employment Has A Direct Relationship To A Vessel's Navigation And Commerce. That maritime employment requires a direct relation to a vessel's navigation and commerce is illustrated by *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52 (1914). In that case, a longshoreman injured on a vessel sued his stevedore/employer for negligence, there being at the time no workmen's compensation remedy. The stevedore contested the existence of maritime jurisdiction based solely on locality and contended that the tort must also be of a "maritime nature." 234 U.S. at 61. The Supreme Court held that there was jurisdiction and emphasized the maritime relationship between the employment and the vessel:

> "The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with

[10] S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H. R. Rep. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4708.

maritime affairs as are the mariners.' " 234 U.S. at 61-62.

The direct relation to a vessel's navigation and commerce is emphasized in the definition of "maritime employment" contained in *Massman Construction. Co. v. Bassett,* 30 F.Supp. 813 (E.D.Mo. 1940), *rev'd on other grounds,* 120 F.2d 230 (8th Cir.), *cert. denied,* 314 U.S. 648 (1941):

> "The management of the vessel, the loading of the same, the care of its equipment and cargo, the performance of any task essential to enable it to accomplish its purpose upon navigable waters are within the term 'maritime employment.' " 30 F.Supp. at 815.

Maritime Employment Is Determined By The Primary And Actual Duties On The Day Of The Accident. The question as to the proper time frame within which to consider an employee's maritime employment *vel non* is in many cases of crucial importance. The Courts of Appeals, however, have not specifically addressed what is the proper time frame.

In *Parker v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941), the Supreme Court said that it is to be determined as of "the time of the accident." 314 U.S. at 245, 247. This was reaffirmed in *Pennsylvania Railroad v. O'Rourke,* 344 U.S. 334, 340 (1953). The Fifth Circuit's opinion in this case before remand stated that the work "at the time of the injury" controlled the employee's status. 539 F.2d at 539. The Fourth Circuit in *Conti v. Norfolk & Western Railway, supra,* referred to the employee's status "at the time of their injuries." 566 F.2d at 895.

The time of the accident is in itself an imprecise standard in that it may mean at the precise moment of the accident, or on the day of the accident, or during a particular period of time before the accident, or as measured by a comparison between the time spent in maritime and non-maritime activity over a

period of, say, a month or a year. The basic consideration is the "primary duty" and the "actual duties" of the employee. *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, 260 (1940). Amici urge this Court to adopt the day of the accident as the time period in which the employment status is examined for coverage purposes. In *Cargill, Inc. v. Powell, supra,* the Ninth Circuit referred to both "the day of his injury" and "the time of the accident," but it is clear that the majority opinion considered the employee's tasks "throughout *a single workday.*" 573 F.2d at 564. (emphasis in original).

Prior to the 1972 Amendments, the courts were faced with an analogous problem — status determination as between seamen and longshoremen, as in *Bassett.* The Ninth Circuit used the *Bassett* rubric in approving the award of LHWCA benefits to a man whose "primary duty" was that of a harbor worker and not a seaman because he worked for 29 of the 30 days of the month as a ship's caretaker. *O'Leary v. Coastal Navigation Co.,* 193 F.2d 717, 719 (9th Cir. 1951). However, the Second Circuit in *Long Island Railroad v. Lowe,* 145 F.2d 516 (2d Cir. 1944), evaluated the employee's duties as of "the day of the accident":

> "The appellants, however, urge that the character of his employment cannot be properly determined unless his work during the entire period of his employment be taken into consideration, and that it was on this basis the Deputy Commissioner reached his conclusion that the decedent was a longshoreman rather than a member of the crew. In this we think error in a matter of law was committed. The employee's duties *on the day of the accident* are the critical facts which should determine his status as a member of the tug's crew. It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as 'mate' of the vessel, we hold that he was a crew

> member, although he might cease to be one on days when he was assigned for other duties. We can perceive no reason in the words or purpose of the Compensation Act for lumping an employee's activities over the period of his employment and classifying him according to the greater number of days on which he was either seaman or longshoreman." 145 F.2d at 518 (emphasis added).

The *Lowe* decision was cited with approval in *Pennsylvania R. Co. v. O'Rourke, supra* at 340 n. 5.

Traditional Maritime Activity. Judicial construction of shoreside extension of coverage under the 1972 Amendments should parallel development of the "traditional maritime activity" required by *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972). The Supreme Court made a complete review of admiralty and maritime tort jurisdiction in *Executive Jet,* and there is a striking similarity between what the Court did in that case in 1972 and what Congress did in the 1972 Amendments. Prior to *Executive Jet* admiralty jurisdiction was based on situs. Prior to the 1972 Amendments the LHWCA coverage was based on situs. Congress added the "maritime employment" status test for employee coverage in the 1972 Amendments, and the Supreme Court required "traditional maritime activity" for admiralty tort jurisdiction in its 1972 decision. The Court said:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."
>
> * * *

> "It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity."
>
> * * *
>
> "We can find no significant relationship between such an event befalling a landbased plane flying from one point in the continental United States to another, and traditional maritime activity involving navigation and commerce on navigable waters." 409 U.S. at 262, 269, 273.

"Maritime employment" embodies the same fundamental concepts that the Supreme Court brought to jurisdictional analysis with the requirement for "traditional maritime activity."

Perhaps the most clearly articulated general test for determining maritime employment was that offered by the Ninth Circuit in *Weyerhaeuser Co. v. Gilmore, supra.* In holding that a "pondman" whose job was to feed floating logs on navigable waters into a sawmill was not engaged in maritime employment, the Court stated:

> "The Board's erroneous conclusion that Claimant is entitled to LHCA benefits stems from a misinterpretation of the frequently stated 'expansion' of coverage by the 1972 amendments. This expansion refers only to the broadened definition of 'navigable waters,' (maritime jurisdictional requirement) which now includes 'adjoining' piers and other areas prescribed in §903(a). In expanding the maritime situs element of the Act, however, Congress clearly did not intend to broaden the class of covered employees to include *anyone* injured in an adjoining area. This intent is manifest in the legislative history." 528 F.2d at 960.

The same thought was again expressed by the Court, but in somewhat different language:

> "Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.' " 528 F.2d at 961.

In deciding the instant cases this Court might well take note of the Ninth Circuit's insistence that "maritime employment" must have a "realistic relationship to the traditional work and duties of the ship's service employment." In the next paragraph the Ninth Circuit speaks of "a realistically significant relationship of 'traditional maritime activity involving navigation and commerce on navigable waters,' " 528 F.2d at 962. Finally, the Ninth Circuit noted that there was absent in Gilmore's employment "any realistically substantial relationship . . . to navigation or commerce upon navigable waters." 528 F.2d at 962. The "traditional maritime activity" rubric comes directly from *Executive Jet.* Amici believe, with the Ninth Circuit, that the principle of *Executive Jet* is useful, if not dominant, in fashioning workable definitions and tests for coverage under the Longshoremen's Act.

The Section 20(a) Presumption Does Not Apply To Jurisdictional Issues. The Fifth Circuit stated in its opinion prior to remand that it was "bound" by the presumption in Section 20(a). *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d at 541. However, the presumption is not applicable to basic questions of statutory interpretation and jurisdiction. The First and Second Circuits have held that the presumption does not apply to jurisdictional issues. *Stockman v. John T. Clark & Son,* 539 F.2d 264, 269 (1st Cir. 1976); *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 48 (2d Cir. 1976). Judge Friendly, writing for the Second Circuit, has said:

> "The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C., §920 . . . They contend that if the meaning of the new coverage provision, 33 U.S.C., §903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this." *Pittston, supra* at 48.

CONCLUSION

The decision below should be reversed in an opinion by this Court which halts the unrestricted expansion of coverage under the 1972 Amendments and articulates clear and definitive tests for establishing coverage with reasonable predictability and certainty.

Respectfully submitted,

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January 11, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P.C. PFEIFFER COMPANY, INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioner,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents,

---

and

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX
TO THE BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND THE AMERICAN INSURANCE ASSOCIATION, AS AMICI CURIAE

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Appendix

Excerpt from the testimony of Quentin Lewton, Richmond Boat Works, accompanied by Alan Bonnified, Larry Dobbins, and Bill Gray:

* * *

> The association appreciates the opportunity this morning to present testimony on a problem that is crippling recreational boating in California. That problem simply stated, is this: The Department of Labor has interpreted the 1972 amendments to the Longshoremen's Act so as to include the recreational boating industry. Insurance companies have followed the Department of Labor's interpretation, as embodied in notice 21 issued on June 6, 1975. Because of a lack of claims experience and uncertain insurance company exposure, these insurance companies have either refused to provide Longshoremen's and Harbor Workers' Compensation Act coverage to the recreational boating industry or have only done so at premium rates which have driven many small companies out of business. Oversight Hearings at 3.

* * *

Excerpt from the testimony of Brian Jessick, State Compensation Insurance Fund:

* * *

> I appreciate this opportunity to testify regarding a subject of serious concern to the subcommittee and to ourselves and many others: the availability of U.S. Longshoremen's and Harbor Workers' coverage for maritime employers.
>
> As you know, the California legislature enacted emergency legislation in mid-1976 to deal with a lack

of available insurance protection for employers subject to the U.S. Longshoremen's and Harbor Workers' Act as this market problem had reached crisis proportions in California.

The market for this insurance had begun constricting following 1972 amendments to the act, and had further deteriorated after the promulgation of subsequent U.S. Department of Labor decisions. Oversight Hearings at 96.

* * *

Excerpt from the testimony of John C. Richman:

* * *

A number of people today have talked about the problem with the death benefits and the escalation or indexing provision whereby benefits are increased on an annual basis according to the change in the national weekly wage. We have a case which perhaps illustrates this particular point. We have a widow with a life expectancy of 47 years. Our original unescalated cost of this case is $505,000. If we escalate it at 5 percent, the cost becomes $1,994,000. If this should be 6 percent, it would be $2,721,000. What if it were 10 percent? Who knows what the ultimate effect of inflation will be over the next 20 or 30 or 40 years? Again, there is just a lot of uncertainty.

While it sounds right and proper to take care of widows in this fashion, is it really equitable? Is there equitability in guaranteeing anyone annual income increases of 5 or 6 or 10 percent a year for the rest of their lives? I don't have such a guarantee and I don't suspect the Members of Congress do either. In addition, this may be a practice that society cannot

afford. It may very well be too expensive. At the very least, the U.S. Longshoremen's and Harbor Workers' Compensation Act needs to be changed to limit the escalation provision to a reasonable and predetermined amount.

* * *

The second aspect of the jurisdictional question regards the extension of the act to shoreside businesses, and that is what you have heard a lot about today. In my opinion, while the act does not apply to the worker painting the center line down the roadway on a bridge, nor to a waiter in a restaurant located on pilings over navigable waters, it appears to me that only an extremely conservative reading of the words in the law would indicate that marinas and boatyards situated adjacent to navigable waters are not now within the scope of the act. Obviously some persons do not agree and there is a very good question about the intent of the legislation. Again, this merely highlights the uncertainty and the ambiguity. Be that as it may, the fact is that the possibilities are such that the price for insurance that these businesses will pay must reflect the benefit structure of the act. Again, I would say, as others have said, there is a crying need for the Congress to define the term "maritime employment."

* * *

The market is tight and underwriters, including the Fireman's Fund, are not very happy about writing this business, basically because, as some one has said, you don't get a lot of premium and you could get a million dollar loss very easily. While we are in the business and we are a broad insurer, we don't go

out and seek Longshoremen's and Harbor Workers' business. Oversight Hearings at 100, 101 and 103.

* * *

Excerpt from the testimony of Zeke Grader, accompanied by Pat Flanagan and Kairos Varner:

* * *

If the fishing industry is to remain under the Longshoremen's and Harbor Worker's Act, as the Department of Labor's 1975 interpretation of the 1972 amendments would do, there quite likely will be no expansion of our shoreside processing facilities. Instead, we will continue to watch foreign processing ships operate off our coast. Instead of the construction of new U.S. midwater trawlers, we can expect to watch the continued harvest off our coasts by foreign fleets as our own fleets will lack the ability to harvest new species. If the Longshoremen's and Harbor Workers' Act continues to be applied to the fishing industry, we quite likely will watch a contraction of this vital industry. Many persons will be laid off as companies find they can no longer pay these insurance rates and the consumer will be forced to pay unnecessarily higher prices for fish. Oversight Hearings at 160-161.

* * *

Excerpt from the Prepared Statement of Albert Kelley, Jr., Treasurer, John T. Clark & Son:

* * *

A little over a year ago we were in a meeting with a number of high officials of the Department of Labor in Washington and we related our company's experience in attempting to obtain competitive quotations in early 1976 for mid-year renewal of our

Workingmen's Compensation insurance. (Our insurance brokers contacted 17 companies on our behalf, 14 of whom said they were not interested in writing Longshore and Harbor Worker's Compensation Act coverage. Our present insurer and two other companies responded positively. Later one of the companies said they were unable to consider the underwriting because they were over-capacity. The other company was not competitive with our present carrier as they would only write a high maximum retrospective plan).

All that the Department of Labor officials could suggest was that the government should in effect get into the insurance business and that they were very receptive to initiating a program within the Department of Labor. Oversight Hearings at 367.

* * *

Excerpt from the Prepared Statement of John M. Walton, III, Secretary, Lavino Shipping Co.:

* * *

The attached Exhibit No. 2 sets forth the recent history of the pure cost of the program on a per claim basis. You will note that in 1973 the pure cost per claim under our $25,000 retention increased 65.2% over the prior year. This dramatic increase can be attributed to the 1972 amendments to the Longshore Act. In addition to the substantial increase in the pure cost per claim in 1973, the cost for excess workers' compensation insurance went up 87% over 1972's cost. As noted, the self-insured retention was increased from $25,000 to $50,000 on January 1, 1974 and then to $150,000 on January 1, 1977. The combination of these increases has caused the average total cost per claim to go from $1,867 in 1972 to

$3,046 in 1976. Keep in mind that these costs are only for claims under the self-insured retention. Nothing has been factored in for claims which have exceeded the retention.

When the cost of claims increase, bond requirements increase, the cost of excess insurance increases and self-insured retention increases. Although not previously mentioned, the cost of administering the claims to comply with the Act has increased dramatically. Finally, markets for both self-insured bonds and excess insurance is shrinking. Fewer and fewer insurance companies are willing to entertain a self-insured stevedores' excess compensation risk. Only two companies were willing to entertain our risk this past January compared with half a dozen or so in prior years. Oversight Hearings at 425-426.

* * *

Excerpt from the Prepared Statement of Walter D. O'Hearn, Jr., President and Chief Executive Officer, McGrath Services Corp.:

* * *

The major problem with the Act is that three provisions contained therein make it impossible for insurance companies to actuarially compute risk. This has occasioned a massive withdrawal by insurance companies from private coverage under the Act. We have provided the staff with a list of insurance companies which have recently informed McGrath of their refusal to provide primary and/or excess insurance coverage under the Act.

* * *

MEMORANDUM

TO Walter D. O'Hearn, Jr. December 27, 1976

FROM John W. Dorsey Re: Workmen's Compensation Coverage Primary & Excess.

Pursuant to your request the following carriers have refused to quote any price for the issuance of policies affording the above captioned coverage.

1. Primary Compensation including U.S.L.H.

Aetna Casualty & Surety	INA
American Home	Maryland Casualty
Bituminous Casualty	Royal Insurance
Chubb & Son	St. Paul
Continental Insurance Co.	Travelers
CNA	U.S.F. & G.
Crum & Forster	Employers of Texas
Employers of Wausas	Midland
Firemens Fund American	Kemper Group
Great American	Argonaut
Houston General	Mission
Home Insurance Co.	

2. Excess Compensation including U.S.L.H.

CNA	Aetna
Atlantic Mutual	Chubb & Son
Home Insurance Co.	Continental Insurance Co.
Employers of Wausas	Dependable Insurance Assoc.
Crum & Forster	Firemans Fund
Great American	Hartford
Highlands Insurance	INA
Maryland Casualty	Ranger
Royal Globe	St. Paul
Travelers	U.S.F. & G.

First State	Wausas Surplus
American Reins.	Northeastern Fire
Inter State	General Reins.
Ranger	Bellefonte
Cal Union	North Brook

Oversight Hearings 453, 462.

* * *

Excerpt from the Letter of Donald Elisburg, Assistant Secretary, U.S. Department of Labor in the Insurance ADVOCATE, July 23, 1977, included with the Prepared Statement of Albert J. Millus, Executive Director of the State Insurance Fund (New York):

> 4. As indicated in the article, the availability of and rates of insurance for Longshore Act coverage have been a serious problem for employers covered by the Act. The Department views this adverse development with grave concern, and is presently reviewing proposals submitted by private contractors to conduct an extensive study of the entire Longshore Act problem. We hope thereby to obtain insight for developing initiatives, if possible for providing relief to employers, either within the present framework of the law or, if necessary, through recommending legislation. Oversight Hearings at 503.

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Excerpt from the testimony of Stewart E. Niles, Jr., Special Counsel, Shipbuilders Council of America:

> The financial burdens are graphically illustrated by the insurance crisis which the shipbuilding industry faces solely as a consequence of this act. To avoid repetition on matters on which this committee has already heard testimony, it suffices to say that the

> insurance market for L. & H. coverage is virtually nonexistent. Oversight Hearings at 573.

* * *

Excerpt from the testimony of John F. McKay, Chairman, Shipyard Committee, American Waterways Operators, Inc.:

> No matter which part of the industry you examine, every company is having extreme difficulty in obtaining LHWCA coverage. The shipyards which are part of larger companies can usually obtain coverage because of the pressure they can exert through the aggregate insurance business of their parent company. However, even they are forced to accept *dangerously large deductibles.* The independent shipyards must obtain coverage in the market or through self insurance.
>
> Several months ago, the firm of Marsh and McLennan (insurance brokers) canvassed 56 insurance companies which have written LHWCA insurance in the past. Only three of the 56 companies confirmed that they will selectively write such insurance. The others indicated that they simply will not write LHWCA in the future.
>
> Self insurance is not a satisfactory answer either, because in reality it is no insurance at all as far as the company is concerned. It is only a desperate measure to keep the gates open. As a general rule, companies with a payroll of less than $5,000,000 should not even attempt self insurance. Thus, any company which has its insurance cancelled is at the brink of disaster.
>
> The first industry survey conducted by the American Waterways Shipyard Committee for the years 1971-1975 indicated that approximately 55 companies went out of business during those years.

The preliminary results of the shipyard survey for the year 1976 indicate that 31 more shipyards have gone out of business. In many instances, the reason given by the respondents was the Longshoremen's and Harbor Workers' Act.

Many companies in our industry have in their titles such designations as "welding and machine company", "bridge company", "engineering", "iron works", and "boiler works". These companies have relied on non-maritime construction work to even out the cycles of the marine construction and repair business. Employees are involved in both maritime and non-maritime construction, and during the course of a day, they may actually be engaged in either occupation. The employer must therefore carry both state compensation and LHWCA insurance for that employee. Because of the exorbitantly high premiums of the LHWCA, many companies in our industry are non-competitive with their counterparts who are not involved in the marine business. As a result, the financial and business stability so necessary to the survival of some of our shipyards is no longer there. Oversight Hearings at 602.

* * *

Excerpt from the testimony of Dennis Lindsay, Counsel for the Master Contracting Stevedore Association of the Pacific Coast, Inc.:

* * *

Let us start at the beginning. A major problem we see in the industry is the question of insurance, its availability and cost. The bottom line here is that to stay in business, under the act you have to have insurance, whether it is primary or excess. In other words, you must have an insurance company back

you or you must go self-insured, one or the other. Because without it you cannot continue in business.

Our problem is, prior to the 1972 Amendments we had competitive insurance available to us, whether we wanted to go primary, whether we wanted to put up the premiums and let the insurance company carry it, or if you wanted to go self-insured because you were large enough you thought you had a better control of the claims. As a self insured you need an excess market available to you.

In the testimony, the bottom line is that is no longer the case. The men here will specifically individualize their own situations as to why they cannot get primary other than Mr. Westfall, who, I guess, is the last stevedore except one on the west coast that has primary, and he will tell you what his problems are.

The rest of the men are under self-insurance now, and the excess market has just about dried up. And to the extent that it has not, the rates are what they believe to be too expensive, and it seems to be getting worse.

* * *

All employers subject to the Longshoremen's and Harbor Workers' Compensation Act are required to obtain insurance with an insurance company authorized by the Office of Workers' Compensation Programs or to receive authorization to become self-insured. Few employers and no members of the Association are large enough to wholly self-insure their Longshoremen's and Harbor Workers' Compensation Act exposure. All Association members must therefore obtain either "primary" or "excess" insurance.

Before the 1972 Amendments, the primary and excess insurance alternatives available to the members of the Association were numerous. Many insurance companies actively sought and competed for Association accounts. In fewer than five years, the situation has changed dramatically.

Even with Longshoremen's and Harbor Workers' Compensation Act primary insurance premiums approaching the level of $35 to $40 per hundred dollars of payroll, very few insurers remain willing to underwrite Longshoremen's and Harbor Workers' Compensation Act exposures.

A 1976 study of the insurance market conducted by an international insurance broker for one of the larger members of the Association disclosed that 32 of 43 insurers who provided Longshoremen's and Harbor Workers' Compensation Act coverage before the 1972 amendments would no longer "write the class". Of the remaining eleven former insurers, only four offered primary coverage, all for premiums that the members' viewed as "out of line." The remainder of the available insurance market restricted its interest to excess policies. Only one potential excess insurer required less than a $3,500,000 underlying "retention."

There is no indication that the insurability of Longshoremen's and Harbor Workers' Compensation Act risks has improved in 1977. We believe the situation has worsened, and that insurance absolutely necessary for the functioning of the Longshoremen's and Harbor Workers' Compensation Act has become almost impossible to obtain for any price and, in those few instances in which insurance is available, obtainable only at a cost far exceeding what industry views as reasonable.

Insurance has become virtually unobtainable because the current Act provides no basis for reasonable forecasting of potential liability. Insurance premiums and costs of self-insuring have become unaffordable because (a) the Longshoremen's and Harbor Workers' Compensation Act has become a public social insurance program bearing only limited relation between work-related hazards and ultimate liability and (b) the 1972 Amendments have vastly increased the cost of delivering appropriate medical care and compensation to injured workers and their survivors and have made a speedy resolution of disputes impossible.

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, is touted by many persons as a "model Act" against which all other workers' compensation programs are to be compared and found deficient. As employers with long experience with this Act and its effects, we suggest that it must not serve as a model for any further legislation before current glaring deficiencies are corrected.

Three major factors underlie the current serious deficiencies.

I. Insurance is an integral part of any workmen's compensation scheme. The 1972 Amendments have caused Longshoremen's and Harbor Workers' Compensation Act liability to become virtually uninsurable.

II. A workers' compensation program is distinguished from public insurance by the existence of a relationship between hazards of employment and ultimate liability. The current Act has lost that essential relationship and has instead become a public social insurance pro-

gram bearing little relationship to the hazards of waterfront employment.

III. The 1972 Amendments were designed to substitute certain increased compensation benefits for the uncertain results of litigation and were intended to solve the social costs of that litigation, the attendant delays and crowding of court calendars and the need to pay for lawyers' services. The 1972 Amendments have, instead, vastly increased the costs of delivering appropriate medical care and compensation benefits to injured workers and their survivors and have foreclosed opportunity for speedy resolution of disputed claims. Oversight Hearings at 631-632, 713-715.

* * *

Excerpt from the statement of Stanley M. Broudy, Vice-President, Crescent Wharf and Warehouse Co.:

* * *

Since the 1972 Amendments were passed by Congress, self-insurers and companies falling under the jurisdiction of the Longshore and Harbor Workers' Compensation Act, have had extreme difficulty in purchasing either primary or excess coverage. The reasons are quite obvious. Basically, the insurance industry does not consider the maritime industry, from an underwriting standpoint, to be a profitable risk because of the very liberal benefits that currently exist under the Longshore and Harbor Workers' Act and because in cases involving death claims and permanent and total disability, an insurance carrier cannot adequately determine its ultimate costs, and therefore, cannot adequately establish reserves. The more specific areas will be discussed later in my testimony. Oversight Hearings at 771.

* * *

Excerpt from the statement of George F. Reall, President of The National Council on Compensation Insurance:

* * *

At this point, we would like to comment on certain aspects of the insuring of benefits under the Longshoremen's Act which have commanded the particular attention of our actuaries and underwriters. For example, when the law, in its present form, was enacted in late 1972, it not only expanded the benefits substantially, but it created new questions of coverage which had to be considered. Some of these questions have only recently been settled. An unsettled situation of this type has made it very difficult for the insurer to understand and value the cost of coverage afforded.

Since the law, in its present form, is relatively new, the statistical data base on which rates are to be determined, classification by classification, is not adequately matured. Uncertainty of coverage, mentioned just above, must resolve itself over time. Also, the various financial and sociological impacts which affect the ultimate cost of benefits, especially where they have been suddenly and substantially expanded, have not emerged clearly yet in the statistical data base. This causes the actuaries particular concern as to the correct estimation of rates where the ratemaking process is necessarily objective, with minimal use of subjective judgment being the rule. Underwriters, of course, know all this and this tends to control their enthusiasm for writing coverage. Oversight Hearings at 827.

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Excerpt from the Statement of American Insurance Association:

* * *

JURISDICTION

When the Longshoremen's Act was initially enacted it was to fill a void resulting from court decision which held the state workmen's compensation system was not applicable on navigable waters of the United States. The 1972 amendments greatly expanded the jurisdiction of this Act beyond the water's edge. It is still extremely unclear just where the Longshoremen's Act exposure exists. Nearly five years after the enactment of the 1972 amendments the U.S. Supreme Court handed down its decision in the case of *Northeast Marine Terminal, Inc. v. Caputo.* This has provided a certain degree of clarification with regard to stevedoring operations. There is, however, still a large degree of uncertainty with regard to other types of operations, in particular, recreational boat building and marinas. These, of course, are usually small operations and it is hard to believe that anyone envisioned such operations as coming within the scope of the Longshoremen's Act when it was originally enacted in the 1920's. A great deal of uncertainty would be removed if this Subcommittee provided a more specific definition of maritime employment and clearly established the scope of this Act. Oversight Hearings at 858-859.

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SUMMARY OF THE CHANGES IN THE 1972 AMENDMENTS

The following provisions were added by the 1972 Amendments and increased the liability of employer/insurance carriers

for compensation and medical benefits payable to injured employees and their dependents:

Section 2(3)	—expanded the definition of "employee' to increase coverage.
Section 2(4) and Section 3(a)	—expanded the definition of "navigable waters" to increase coverage.
Section 2(14) and Section 2(18)	—the definition of "dependent child" now includes a college student up to age 23 whereas prior to the 1972 Amendments the cut-off date was 18 unless a child over 18 was wholly dependent on the employee and incapable of self-support by reason of mental or physical disability.
Section 6(a)	—compensation is now payable for the first 3 days of disability if the disability lasts more than 14 days, whereas prior to the 1972 Amendments an employer/insurance carrier was not liable for the first 3 days of disability unless the disability lasted more than 28 days.
Section 6(b)	—the maximum weekly compensation payable is now 200% of the national average weekly wage, whereas before the 1972 Amendments the maximum was a flat $70 per week.

Section 6(b)(3) —the national average weekly wage maximum is escalated each year to an amount determined by the Secretary of Labor.

Section 6(d) —the higher maximum under the national average weekly wage applies to those persons who were receiving compensation benefits for permanent total disability or death at the time the 1972 Amendments were enacted.

Section 8(c)(23) —after an injured employee who has a permanent partial disability has received his scheduled award, the injured employee may then receive compensation for loss of wage-earning capacity, i.e., two-thirds of the difference between the employee's average weekly wage before the injury and his wage-earning capacity after the injury.

Section 8(d) —death benefits are payable to the survivors of an employee receiving compensation for permanent partial disability even though the employee died from causes unrelated to the injury which caused the permanent partial disability.

Section 9 —death benefits are payable to the survivors of an employee receiving compensation for permanent total disability even though the employee died from causes unrelated to the injury which caused the permanent total disability.

Section 9(a) —funeral expenses are now payable up to $1,000, whereas before the 1972 Amendments the limit was $400.

Section 9(b) —death benefits payable to a widow or widower without dependent children is now 50% of the average wages of the deceased employee, whereas before the 1972 Amendments the death benefits were 35% of the deceased employee's average wages.

Section 9(f) —the compensation or death benefits payable for permanent total disability or death are now increased each year by the percentage which the national average weekly wage increased from the preceding year. This is a totally new subsection to Section 9.

Section 12(a)
and
Section 13(a) —the time for giving notice of injury or death and the time for filing claims for injury or death have been liberalized in that the time periods do not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. This may be a significant provision in the current wave of asbestosis cases.

Section 14	—the $24,000 maximum on compensation payable to an employee for temporary total, permanent partial, or temporary partial disability was eliminated by the 1972 Amendments. This $24,000 maximum was in former subsection (m) of Section 14.
Section 19(d) and Section 21 (b)	—all disputes are now resolved in adversary proceedings before Administrative Law Judges and a newly created Benefits Review Board.
Section 28	—employer/insurance carriers must now pay attorney's fees to attorneys who represent injured employees or dependents in connection with contested compensation claims if the employer/insurance carrier was unsuccessful on the contested issue.
Section 44(c)(1)	—the employer/insurance carrier now pays $5000 into the special fund in all compensable death cases where there is no person entitled to receive the compensation benefits for death, whereas before the 1972 Amendments the employer/insurance carrier paid only $1000 into the special fund.